



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 182 OF 2013

(Originally Nakuru High Court Civil Case No. 364 of 2010)

FRANCIS MUGO MAINA

CLAIMANT

v

PRAYING MANTIS LIMITED

RESPONDENT

JUDGMENT

1. Francis Mugo Maina (Claimant) sued Praying Mantis Security Limited (Respondent) on 17 December 2010 before the High Court in Nakuru alleging his services were unjustifiably terminated and seeking Kshs 98,240/- as terminal dues.
2. The Respondent was served and it filed a Defence on 15 February 2011 and on 4 March 2011, the Claimant filed List of Agreed Issues and List of Witnesses.
3. The Respondent filed a List of Documents on 15 March 2011, and witness statements on 6 June 2011. On 5 January 2012, the Claimant filed a Further List of Documents.
4. On 17 May 2013, the Suit was transferred to this Court for hearing and determination and on 30 October 2013, the Claimant was granted leave to amend the Statement of Claim. As a result, an Amended Plaintiff was filed on 31 October 2013. The effect of the amendment was to correct the name of the Respondent from Praying Mantis Security Ltd to Praying Mantis Ltd.
5. Consequent upon the amendment, the Respondent filed an Amended Defence on 14 November 2013. The firm of B.A. Obiero also came on record for the Respondent instead of the firm of Githui & Co. Advocates.
6. On 11 March 2014, the Respondent filed a Re-Amended Defence, pursuant to a Court order given on 26 February 2014.
7. The Cause proceeded to hearing on 10 February 2015, after an application for adjournment by the Claimant was rejected.

Issues for determination

8. After considering the pleadings and the evidence tendered, the Court has identified the issues for determination as, *whether the suit is defective, whether the Claimant was employed by the Respondent, whether the Respondent terminated the Claimant's employment without justifiable cause and whether the Claimant is entitled to the reliefs sought.*

Whether the suit is defective

9. Although the Respondent raised this defence, it was not taken up either as a preliminary issue or during the hearing. The Court will treat the issue as having been abandoned.

Whether Claimant was employed by the Respondent

10. The Claimant pleaded that he was employed by the Respondent as a driver at a wage of Kshs 3,200/-. The Respondent denied employing the Claimant.

11. In testimony, the Claimant stated that he was employed by the Respondent in 2001 and that he used to ferry the Respondent's guards to various assignments within Nakuru. He also stated that he was contributing to the National Social Security Fund.

12. The Claimant produced a copy of the Respondent's pay sheet (exh. 2) and identified his name in the pay sheet. He also identified his name in the Respondent's Operation Control Chart (exh. 3).

13. During cross examination, the Claimant produced his identity card (Francis Mugo Maina) and stated that he used the identity card when securing employment but the Respondent captured his name as *Franco* instead of Francis.

14. The Claimant called a Peter Oyamo as his witness. This witness stated that the Claimant was an employee of the Respondent and that he (witness) served as a Controller with the Respondent from September 2001 to April 2006.

15. The Respondent's Branch Manager (Nahum Adero Oduor) stated that the Respondent's records did not show an employee by the name Francis Mugo Maina. The records indicate however, that there was an employee by the name *Franco Mugo Maina*.

16. The witness further stated that the person who testified as the Claimant was the *Franco Mugo Maina* in the Respondent's records, and that he was a driver. He also made reference to a Questionnaire employees used to sign.

17. The Respondent's second witness Meshack Oluoch Oyedho confirmed that the person who testified as the Claimant was a day shift driver with the Respondent.

18. From the testimony and documents tendered as evidence, the Court is satisfied that Francis Mugo Maina and *Franco Mugo Maina* refer to the same person and the Claimant was an employee of the Respondent from 2001.

Whether Respondent terminated Claimant's employment without justifiable cause

19. The Claimant's case on the termination was that he was not given the reasons for the termination of employment and that he was denied the keys to the vehicle he was driving by a brother to the Respondent's manager, who told him he was dismissed and he should go home. He stated he did not abscond from work.

20. During cross examination the Claimant stated that there were questions about a missing hydraulic jack and shaving machine around the time he was dismissed.

21. Mr. Oyamo who testified on behalf of the Claimant gave a hint as to how the separation occurred. He stated that the Claimant and another driver had a fight over the missing jack and shaving machine after which the Claimant lost interest in his work.

22. The Respondent denied terminating the services of the Claimant and pleaded in the alternative that the Claimant absconded from duty in Mid May 2006, after a shaving machine and hydraulic jack got

missing.

23. The Respondent's Branch Manager testified that the Claimant was not dismissed and that the Respondent's practice was to give 3 warnings before dismissing an employee and those employees would be dismissed in writing.

24. He stated that he was the Manager in 2006, and he did not dismiss the Claimant either orally or in writing and he did not know why the Claimant left work because he did not communicate.

25. In cross examination he stated that the Claimant deserted work, which could attract summary dismissal, but he did not summarily dismiss him.

26. The Respondent's second witness admitted he had a fight with the Claimant around the time the separation occurred but he did not know why the Claimant left work.

27. Both sides were not very forthcoming with details regarding the separation of the Claimant and the Respondent.

28. But accepting the extreme that the Claimant deserted work, if the Respondent's Branch Manager's evidence is to be believed, the Claimant should have been given a hearing before the summary dismissal. Under section 44 of the Employment Act, 2007 absence from duty without permission or leave is a ground for summary dismissal and under section 41 of the Act, an employer is obligated to hear an employee before summary dismissal.

29. Further, the Respondent did not disclose whether it informed or made any reasonable attempts to reach the Claimant through a show cause letter to explain any absence.

30. The Court is therefore of the view that it is more probable that the Claimant's employment was terminated without compliance with procedural fairness safeguards outlined in section 41 of the Employment Act, 2007.

31. In any case, the Respondent did not prove desertion as a reason for dismissal (section 43 of the Act) or that it was a valid and fair reason in the circumstances of this case.

Appropriate relief

3 months pay in lieu of notice

32. The Claimant did not provide any contractual basis as to the payment of 3 months pay in lieu of notice as opposed to the statutory minimum 1 month pay in lieu of Notice.

33. The Court would therefore find that the Claimant is entitled to Kshs 3,200/- being the equivalent of one month's pay.

Gratuity

34. The Claimant sought Kshs 8,000/- on account of gratuity. He did not bring to the attention of the Court any contractual or statutory provision entitling him to gratuity. This head of claim is therefore declined.

Leave allowance

35. Under this head, the Claimant sought Kshs 19,200/-.

36. In testimony, the Claimant did not lay any evidential basis for this claim. He did not even disclose whether the payment of leave allowance was contractual or statutory.

37. In any case, leave allowance and entitlement to leave or payment in lieu of leave (commuted leave) are distinct issues.

Overtime

38. For overtime, the Claimant sought Kshs 61,440/-. During testimony, the Claimant stated that he worked throughout the week from 6.00am to 6.00 pm.

39. The Respondent did not challenge the Claimant on this issue.

40. The Court can also take judicial notice that ordinarily, employees in the private security services sector work in two shifts of twelve hours each day.

41. Further, employees would not ordinarily keep records of attendance or overtime.

42. The Court would therefore find that the Claimant has made a case for the award of the amount claimed as overtime.

Conclusion and Orders

43. The Court finds and holds that the Respondent terminated the employment of the Claimant without justifiable cause and awards him and orders the Respondent to pay him

(a)	1 Month wage in lieu of Notice	Kshs 3,200/-
(b)	Overtime	Kshs 61,440/-
	TOTAL	Kshs 64,640/-

44. The claims for gratuity and leave allowance are dismissed.

45. The Claimant to have costs assessed at Kshs 20,000/-.

Delivered, dated and signed in Nakuru on this 10th day of April 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Githui instructed by Githui & Co. Advocates

For Respondent Mr. Okeke instructed by B.A. Obiero & Co. Advocates